

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION**

No. 2:12-md-02323-AB

MDL No. 2323

**THIS DOCUMENT RELATES TO:
All Actions**

**PLAINTIFFS' UNCONTESTED MOTION FOR ORDER ESTABLISHING A TIME
AND EXPENSE REPORTING PROTOCOL AND APPOINTING AUDITOR**

1. Plaintiffs, by and through the Plaintiffs' Executive and Steering Committees ("PEC" & "PSC"), hereby respectfully move the Court for entry of an Order: (a) establishing a Time and Expense Reporting Protocol to ensure that any fees and expenses for common-benefit work for which counsel may later seek reimbursement from a Common Benefit Fund, if any such fund is established by this Court, are reasonable, necessary and non-duplicative; and (b) appointing Alan Winikur and the firm Zelnick, Mann and Winikur, P.C. to serve as auditor to conduct periodic reviews of fee and expense reports submitted by Plaintiffs' counsel.

2. Pursuant to Local Rule 7.1(b), a Certificate of Counsel attesting that Defendants take no position on this motion and, therefore, do not contest this Motion, is attached hereto.

3. The PEC and PSC seek entry of this Order to satisfy their duties to the former-player plaintiffs in this matter to ensure the efficient and effective pre-trial prosecution of their claims, ensure that time and resources expended by counsel in this matter inure to the common benefit of the former player-plaintiffs, and protect against unreasonable or unnecessary fees and costs, reimbursement for which may be sought from a Common Benefit Fund that may be established by the Court. The PEC and PSC submit this Motion without assumption regarding

whether this Court will later authorize such a Fund or authorize disbursements from such Fund should it be established.

4. On January 31, 2012, pursuant to 29 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation (“JPML”) transferred for consolidated or coordinated pretrial proceedings cases involving claims by former players against the National Football League (“NFL”) and other Defendants stemming from injuries sustained while playing professional football, including damages resulting from the permanent long-term effects of head trauma suffered while playing professional football. Transfer Order, Jan. 31, 2012, ECF No. 1.

5. After this MDL was established by the JPML, various plaintiffs’ counsel who had applied, through a joint application, to serve in leadership positions in this MDL conducted common-benefit work, including negotiating and executing a Tolling Agreement, *see* Notice of Tolling Agreement, May 15, 2012, ECF No. 75, and engaging in numerous meet and confers regarding scheduling and related matters in preparation for this Court’s Organization Conference on April 25, 2012, *see* Notice of Filing Of Proposed Case Management Order No. [3] and Notice of Filing of Proposed Conference Agenda, Apr. 11, 2012, ECF Nos. 57 & 58.

6. Thereafter, this Court appointed plaintiffs’ counsel-applicants to serve as Co-lead Counsel, as members of the Executive and Steering Committees, and as Plaintiffs’ Liaison Counsel. *See* CMO No. 2, Apr. 26, 2011, ECF No. 64; CMO No. 3, May 11, 2012, ECF No. 72.

7. Since their appointment, members of the PEC and PSC, and other plaintiffs counsel as directed by the PEC, have conducted common-benefit work including, but not limited to, engaging in meet and confers with Defendants relating to proposed case management orders, scheduling and procedural stipulations and related matters, drafting and filing Master and Short Form Complaints, and responding to Riddell Defendants’ June 19, 2012 brief (ECF Nos. 83, 84, 92, 94, 110 & 264). Plaintiffs’ Liaison Counsel has conducted coordination and related

administrative functions and provided all plaintiffs' attorneys representing former players in this litigation with regular updates regarding this Court's Orders, and guidance regarding procedural issues. The PEC and PSC expect that, in the coming months, plaintiffs will invest resources in common-benefit work related to the upcoming motions and briefing schedule set forth in Case Management Order No. 2.

8. Entry now of an Order establishing a protocol governing permissible common benefit time and expenses invested in this matter and requiring periodic reporting by plaintiffs' counsel conducting such common-benefit work will help ensure only reasonable and necessary fees and costs inuring to the benefit of all plaintiffs are incurred. Establishing such guidelines early in the course of this litigation, even prior to the establishment of a Common Benefit Fund, if any, will help ensure that staffing levels for common-benefit work are appropriate and common-benefit time and expenses are reasonable, and will reduce the risk of later conflict over fees and expenses. *See Manual for Complex Litigation (Fourth)* §§14.212, 14.213 (2011). Further, imposing record-keeping procedures and requiring the submission of periodic reports "encourages lawyers to maintain records adequate for the Court's purposes," and facilitates Court review of later-submitted fee petitions, if any. *See id.* §§ 14.212–214.

9. Accordingly, the Proposed Order requires members of the PEC and PSC to contribute assessments to an Interim Litigation Fund in amounts agreed to by the PSC to cover interim litigation expenses for administration of this MDL. It likewise requires all counsel conducting common-benefit work to maintain contemporaneous and detailed time and expense records in a specific electronic format. *See id.* § 14.213 (recommending that time keeping be addressed early in the case and that contemporaneous records identifying the activity and nature of work be required, along with the use of computer programs to facilitate analysis and agreed-on forms of summaries). Such records must be submitted quarterly to a PEC-designated attorney

and shall be subject to further review by the Court-appointed auditor (proposed herein) for compliance with guidelines of the time and expense reporting protocol.

10. The Proposed Order delineates compensable common-benefit time categories, such as time spent conducting discovery, in motions practice, pursuing organizational functions, preparing for and conducting trial, and related litigation functions. To ensure common benefit fees are reasonable, compensable categories exclude, *inter alia*, time spent that was not authorized by the PEC, time spent on individual client cases, time spent reading and reviewing court documents unless necessary to conduct a compensable function, and any duplicative time. Similarly, the Proposed Order limits compensable expenses to those necessary to carry out legitimate compensable work, and imposes limitations on both travel and non-travel expenses, such as limiting reimbursement for coach-class fare only and excluding most secretarial functions, to ensure only reasonable costs are reimbursed.

11. Such time and expense limitations are appropriate to ensure the appropriate level of staffing and expenses. *See id.*, § 14.212 (discussing guidelines regarding who may charge for discovery, court and trial time); § 14.216 (discussing limitations on expense categories).

12. Accordingly, other MDL courts have entered orders establishing similar time keeping and expense reporting protocols at early stages of the litigation, prior to the establishment of any Common Benefit Fund. *See, e.g.*, Ex. A, Pretrial Order No. 9, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, No. 10-md-02179 (E.D. La. Oct. 8, 2010), ECF No. 508 (entered three months after transfer by the MDL panel); Ex. B, Mem. & Order, *In re: Oral Sodium Phosphate Solution-Based Prods. Liab. Action*, No. 1:09-SP-80000, MDL No. 2066 (N.D. Ohio Sept. 30, 2009), ECF No. 34 (entered three months after transfer, and setting forth guidelines "in anticipation of the possibility that, at some time in the future, there may be applications . . . for payment of common benefit fees or

expenses”); Ex. C, Pretrial Order No. 6, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-01657 (E.D. La. Apr. 8, 2005), ECF No. 245 (entered two months after transfer).

13. Where a Common Benefit Fund may be later established, with time and expenses for work benefitting all plaintiffs to be paid from such Fund, it is appropriate to appoint an outside auditor to review time and expense reports submitted by common benefit attorneys and to submit reports to the Court as requested. As with time and expense reporting protocols, early auditing of time and expense reports helps reduce the risk of conflicts regarding payment for fees and expenses from a Common Benefit Fund by ensuring consistency and accurate reporting early in the case.

14. Plaintiffs therefore also request that the Court appoint Alan B. Winikur, CPA/ABV/CFF and his firm, Zelnick, Mann and Winikur, P.C., as the outside auditor for time and expenses submitted in anticipation of a Common Benefit Fund, if any, that may be established. Mr. Winikur will be charged with determining which items submitted for payment of common benefit time and expenses meet the criteria established by the Proposed Order.

15. Mr. Winikur’s Curriculum Vitae (“CV”) and information about his firm, Zelnick, Mann and Winikur, P.C., are attached hereto as Exhibit D. As his CV demonstrates, Mr. Winikur and his firm have extensive experience performing audits in comparable MDLs and have been appointed to serve in that role in this judicial district. *See, e.g.*, Ex. E, *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-md-1871 (E.D. Pa. Aug. 13, 2010), ECF No. 757 (appointing auditor); *see also In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 2010 WL 3292787, at *4 (E.D. Pa. Aug. 19, 2010) (noting prior appointment of Alan B. Winikur).

16. If appointed, Mr. Winikur has agreed to work as the time and expense auditor of the Common Benefit Fund in this litigation. Mr. Winikur shall be compensated for his work from PSC’s Interim Litigation Fund funded by the PEC and PSC members, and later from the

Common Benefit Fund for this MDL, if any such Fund is established by the Court, subject to Court approval of such fees and costs.

17. For the foregoing reasons, Plaintiffs respectfully request entry of an Order establishing a time and expense reporting protocol and appointing an outside auditor.

Dated: Sept. 7, 2012

Respectfully submitted:

/s/ Jeannine M. Kenney

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CERTIFICATE OF COUNSEL

I hereby certify that I have communicated with counsel for all Defendants in this matter and they take no position on the foregoing Motion. Thus the foregoing motion is uncontested.


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